

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-622 715-D3
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Donald Murlee WOODS,

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1935

Donald Murlee WOODS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 21 May 1971, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege and while serving as Chief Steward on board the SS OVERSEAS DINNY under authority of the document above captioned, Appellant:

- (1) on or about 27 November 1968, while the vessel was in the port of Oakland, did wrongfully engage in acts of sexual perversion with a member of the crew; and
- (2) between 18 and 27 November 1968 inclusive, while said vessel was at sea and in port, did wrongfully engage in acts of sexual perversion with two other crewmembers.

At the hearing, Appellant was represented by professional counsel who entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence extracts from the Shipping Articles and the Official Logbook of the vessel and the testimony of five members of the crew.

In defense, Appellant offered no evidence.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and both specifications had been proved. He entered an order revoking all documents issued to Appellant.

The entire decision was served on 10 June 1971. Appeal was timely filed on 25 June 1971 and perfected on 13 July 1972.

FINDINGS OF FACT

From 18 to 30 November 1968, Appellant was serving as Chief Steward on board the SS OVERSEAS DINNY and acting under authority of his document while the ship was at sea and in port.

On or about 19 November 1968, while the vessel was at Port Hueneme, Appellant told a sixteen year old messman to come to his room. Threatening to fire the messman, he then committed an unnatural sexual act upon him.

On or about 27 November 1968, Appellant summoned an eighteen year old crew pantryman to his room and locked the door. After encountering some resistance, Appellant pulled the other man's pants down to his knees and was preparing to commit an unnatural act when interrupted by a knock at the door.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (1) the 26 month delay in the rendering of the order of the Administrative Law Judge violated Appellant's right to a "speedy trial";
- (2) Counsel's lack of opportunity to examine certain statements not introduced in evidence constitutes grounds for reversal;
- (3) the Administrative Law Judge's refusal to grant a continuance so that Appellant might face the Coast Guard witnesses was an abuse of discretion;
- (4) the evidence fails to support the Administrative Law Judge's findings of fact and conclusions of law;
- (5) the Coast Guard should not continue to enforce rules and regulations against homosexuality between consenting adults; and
- (6) the order of revocation is inappropriate.

APPEARANCE: Jennings, Gartland & Tilly, San Francisco, California.

OPINION

I

It is true, as alleged by Appellant, that there occurred an apparently unexplained delay of some 26 months between the termination of the hearing and the rendering of the Administrative Law Judge's decision and order. A delay of this nature, however does not per se constitute grounds for reversal. The facts of each case must be scrutinized in order to determine the reasons for the delay, the possible prejudice to the Appellant occasioned thereby, and the effect upon the remedial nature of the proceedings.

While the facts of this case lend no clear insight to a possible excuse for the delay, they are equally barren of indications of prejudice to the Appellant. Just prior to the close of the hearing, the Administrative Law Judge stated that if he found either specification proved, he would order revocation of Appellant's document. He then found the first specification proved and reserved decision on the other. While this renders the delay all the more inexplicable, it does also point up the absence of prejudice to the Appellant. Rather than being left to ponder his possible fate, he knew to near certainty that his document would be revoked. It was only a matter of time. Appellant had the benefit of this time to prepare himself for a non-maritime future. In the meantime, he was free to sail under the authority of his document and he, in fact, retained possession of that document until 9 February 1972. He, thus, had what amounted to a grace period of nearly three years. This is deemed anything but prejudicial.

The purposes of suspension and revocation proceedings are the promotion of the safety of the passengers and crews of vessels and the insurance that certificated personnel are qualified to carry out their duties and responsibilities. Thus, while the delay itself cannot be said to have been in furtherance of this purpose, the eventual enforcement of the order in this case does have such an effect in light of the fact that the findings of the Administrative Law Judge amount to a finding that Appellant is not so qualified. Should Appellant be able to show in the future that he is once again qualified to hold a merchant mariner's document, a new document may be issued to him within the limitations and under the provisions of 46 CFR 137.13.

II

Appellant's second contention is meritless. In the first place, Appellant makes the unwarranted assumption that the statements were in the custody of the Coast Guard and subsequently lost. The record shows that the statements were, in fact, in the custody of the Senior Investigating Officer in New York. They were to have been forwarded to San Francisco and made available to Appellant's counsel. However, the record does not show that

counsel made any further inquiry concerning these statements. In fact, he waived final argument and submitted the case on the evidence introduced by the Investigating Officer. Had counsel considered such statements truly necessary for the defense, his proper course of action would have been to request a subpoena for their production. This he did not do, nor does it appear that he made any attempt to procure these statements directly from the Senior Investigating Officer, or Appellant's own union representative.

III

There is no basis for holding that the Administrative Law Judge abused his discretion in refusing to grant a continuance of the hearing. While the opportunity for a person charged to face the witnesses against him would ordinarily seem to meet the "good cause" test of 46 CFR 137.20-10, Appellant's own conduct with regard to the hearing fails to show that he placed any great importance on such an opportunity. He was served with the charges some 50 days in advance of the scheduled hearing date and he, in fact, never appeared on that date or at any subsequent hearing session. 46 CFR 137.20-10 directs the Judge to consider the availability of witnesses in determining whether or not to grant a continuance. In this case, the government witnesses were available only upon the date on which they testified and there was little reason to believe that these witnesses and Appellant could be assembled together at some future time. It is noted, in addition, that the Judge offered to entertain a motion for reappearance or further cross-examination by interrogatories. Counsel fully cross-examined these witnesses at the hearing, made no such later motion and submitted the case with no argument or defense. Under the above circumstances, the hearing was properly held in Appellant's absence and it cannot be said that the refusal to grant a continuance prejudiced Appellant in any way.

IV

With regard to Appellant's fourth contention, it is sufficient to say that the unrebutted testimony of the Coast Guard witnesses, including the victims of Appellant's illicit acts, together with the Official Logbook entries made in substantial compliance with 46 U.S.C. 702 constitute substantial evidence of a reliable and probative nature. The findings of the Administrative Law Judge in this case could be disturbed only through a reevaluation of the credibility of the government witnesses. This would be beyond the scope of appellate review.

V

Appellant's fifth ground for appeal is hardly worth discussion, if only because the record in this case does not show consent on the part of the victims. In addition, there is some question as to whether these victims should be considered "adults" for the purposes involved. Suffice it to say, however, that the issue would be, not whether conduct such as occurred in this case should be punished, but whether or not Appellant is qualified to hold a merchant mariner's document. The purpose of suspension and revocation proceedings and the duty of the Coast Guard towards the passengers and crewmembers of vessels compels a finding that he is not so qualified.

VI

There is no proper basis for a contention that the order of the Administrative Law Judge is overly severe. It is consonant with the Scale of Average Orders and, although the Scale is merely a guide, the Judge will not be faulted for assigning an order recommended therein in the absence of a clear abuse of discretion. While it is true that 46 CFR 137.03-5 does not require revocation, it does manifest the inherent propriety of such an order in a case of this nature. It is true that the Judge stated that revocation would be the only order he could assign in the event either specification was found proved. However, rather than a misstatement of the mandate of 46 CFR 137.03-5, this statement amounted to no more than a recognition of Coast Guard policy espoused in Commandant Appeal Decision No. 1042 (MOLINA).

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 21 May 1971, is AFFIRMED.

C. R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 7th day of June 1973.

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